

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

76-1319

To be argued by
DON D. BUCHWALD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1319

UNITED STATES OF AMERICA,

Appellee,

—v.—

RICHARD T. FORD,

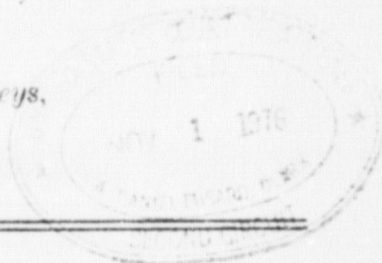
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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—v.—

RICHARD T. FORD,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Richard T. Ford appeals from a judgment of conviction entered on October 14, 1975, in the United States District Court for the Southern District of New York, after a six day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment S.74 Cr. 36, filed April 3, 1974, charged Ford and co-defendant James P. Flynn * with the October 20, 1971 \$203,938.00 bank robbery of the Orange County Trust Company in Middletown, New York in violation of Title 18, United States Code, Section 2113(c) (Count Three); using firearms to commit the robbery in violation of Title 18, United States Code, Section 924(c) (1) (Count

* Flynn became a fugitive shortly after the filing of the indictment and has not yet been apprehended.

Four); transporting a stolen automobile from Boston, Massachusetts to Middletown two days prior to the robbery in violation of Title 18, United States Code, Sections 2312 and 2 (Count Two); and conspiracy to commit the above offenses in violation of Title 18, United States Code, Section 371 (Count 1).*

Trial commenced on September 2, 1975, and concluded on September 9, 1975 when the jury returned a guilty verdict on each count.

On October 14, 1975, Judge Motley sentenced Ford to imprisonment for five years on each count, said terms to run concurrently with one another. The Court below further recommended that the sentence be served concurrently with an eight-to-ten years sentence presently being served by the defendant in Massachusetts.

Statement of Facts

A. Initial Charges, Pre-Trial Procedures and Custody

On October 11, 1973 Ford was arrested by F.B.I. agents in Chicago on the basis of two warrants—a Southern District of New York bank robbery warrant issued on November 11, 1971, for the offense ultimately tried in this case, and an older warrant from the District of Massachusetts for Unlawful Flight to Avoid Confinement ("UFAC") arising from 1968 Massachusetts state charges against Ford for escape and assault with intent to commit murder (Tr. 664, 678, 681-82).** Within one week,

* The instant indictment superseded Indictment 74 Cr. 279, filed March 21, 1974, in which Ford alone had been named as a defendant.

** Page references with the prefix "App." refer to the Appellant's Appendix. "G.App." refers to pages of the Government's Appendix; "Tr." refers to Trial Transcript; and "GX" refers to the Government Exhibits at trial.

the Government dismissed the UFAC complaint and turned Ford over to Chicago police authorities for extradition to Massachusetts on the older state charges. While in the custody of the Chicago police, on or about October 28, 1973, Ford sent letters to the United States Attorney for the Southern District of New York and the United States District Court for the Southern District of New York requesting a speedy trial on the federal charges (App. D. ¶ 4 and Exhibits A and B thereto).

Ford was turned over to Massachusetts authorities by the Chicago authorities and the federal bank robbery warrant was lodged as a detainer in Massachusetts. On February 8, 1974, midway through his trial in Massachusetts, Ford changed his plea to one of guilty on charges of escape, assault with intent to commit murder and related charges. He was sentenced forthwith in Massachusetts to concurrent terms of 8 to 10 years imprisonment which term he is presently serving (App. F, ¶ 4).*

On March 21, 1974, Ford was charged in indictment 74 Cr. 279 with bank robbery and accompanying assault in violation of 18 U.S.C. §§ 2113(a) and (d). On March 25, 1974 the Government secured a writ of habeas corpus *ad prosequendum* ordering Ford's production on April 1, 1974 to "plead to indictment 74 Cr. 279" (App. H). On April 1, 1974, at the time of his arraignment in Part I of the District Court before Judge Tenney, Ford, who appeared without counsel, advised the Court as follows:

"I am going to hire a lawyer from Massachusetts, and I was hoping I would be returned to Massachusetts as soon as possible so I will have ample

* Ford was represented in the Massachusetts proceedings by attorney Ronald Chisholm of Boston, his trial attorney in the District Court (Transcript of October 14, 1975 Sentencing Minutes p. 4).

time to prepare my defense, since I am going to hire a lawyer there in Massachusetts." (Transcript of April 1, 1974 Arraignment on 74 Cr. 279, p. 3).

A not guilty plea was directed, the case was assigned to Judge Bauman and the writ was adjourned for one week until Ford appeared with counsel (April 1, 1974 Transcript, p. 4-5). During the course of the arraignment, Ford reiterated his desire to be returned to Massachusetts as soon as possible:

"The Defendant: Your Honor, it is really hard on me sitting here. I live in Massachusetts, my wife is in Massachusetts.

The Court: Get in touch with your lawyer, which I am allowing you to be able to do, and if you can be extradited you will have somebody representing you.

The Defendant: You mean I could be sent back to Massachusetts as soon as possible?

The Court: Well, if you have a lawyer representing you here, yes."

(April 1, 1974 Transcript, p. 5).*

On April 1, 1974, the Government also filed a Notice of Readiness with respect to Indictment 74 Cr. 279 (App. F, ¶ p.6). On April 3, 1974, superseding Indictment 74 Cr. 336, charging both Ford and Flynn in the instant case, was filed (App. B). Ford was provided with a copy of the superseding indictment in open court on April 5, 1974 and the writ was adjourned at that time by Judge Tenney to April 15, 1974 (April 5, 1974 Transcript, pp. 3-7).

* During his April 1, 1974 arraignment on 74 Cr. 279, Ford mentioned that Chisholm might possibly represent him and was advised that Chisholm had represented Flynn (who was not named in 74 Cr. 279) before the Grand Jury (April 1, 1974 Transcript, p. 6).

On April 15, 1974, appearing with attorney Ronald Chisholm before Judge Bauman, Ford pled not guilty to Superseding Indictment 74 Cr. 336. On the same day, a bench warrant was issued for Flynn who failed to appear (April 15, 1974, 9:50 a.m. Transcript, pp. 3-4). Judge Bauman also directed Ford, upon the Government's motion of April 2, 1974, to provide handwriting and hair samples within one week or face punishment for contempt. The writ was adjourned again until April 25, 1974, the return date for defense motions (April 15, 1974, 2:15 p.m. Transcript, pp. 2-4).

On April 25, 1974, Judge Bauman ruled on the outstanding defense discovery motions (April 25, 1974 Transcript, pp. 3-13), held Ford in civil contempt for refusing to furnish hair samples and warned Ford of the possibility of criminal contempt if he persisted in his refusal to furnish the hair samples (Transcript, pp. 15-16). A May 28, 1974 trial date was set and the writ was again adjourned (Transcript, p. 17).

On May 17, 1974, the Government moved to adjourn the trial for a period of 90-days or until the apprehension of fugitive co-defendant Flynn, whichever occurred first. In support of the application, the Government submitted the affidavit of Assistant United States Attorney Jed Rakoff (App. F) and a sealed affidavit, dated May 16, 1974, to Judge Bauman (May 22, 1974 Transcript, p. 3).

On May 22, 1974, the Government's application for an adjournment was granted by Judge Bauman and an August 21, 1974 trial date was set (May 22, 1974 Transcript, pp. 2-8). Judge Bauman held that the Government was entitled to a reasonable period to attempt to apprehend Flynn, have just one trial, and thereby save "judicial time, manpower and money" (May 22, 1974 Transcript, p. 4). The Court found no prejudice to the defendant in the preparation of his defense, and expressed

the view that Ford, who had a prior felony conviction in addition to his more recent conviction for escape and assault with intent to commit murder, probably was not being substantially deprived by alleged work release ineligibility in Massachusetts resulting from the federal detainer (May 22, 1974 Transcript, pp. 6-8). Following the granting of the adjournment, the defense requested that Ford be returned to Massachusetts so that he and Chisholm could more conveniently prepare for trial together (G.App., p. 2a).

On June 14, 1974, Ford was returned to the Massachusetts Correctional Institute in Walpole, Massachusetts (App.H.).

In August, 1974, following Judge Bauman's resignation from the bench, the case was reassigned to Judge Motley. On August 16, 1974 the defense was notified that the trial would commence on November 18, 1974 (App.D, ¶ 12). On September 30, 1974, the defense moved for additional discovery of certain Government witnesses. Judge Motley denied the motion at a hearing on October 16, 1974 in view of co-defendant Flynn's fugitivity and prior record of violence (October 16, 1974 Transcript, pp. 14-15).*

On November 1, 1974, the Government moved for an additional adjournment of up to ninety days in which to apprehend Flynn. The motion was supported by the affidavit of Assistant United States Attorney Steven Schatten (App.G) and a second sealed affidavit, dated November 1, 1974. On November 4, 1974, the defense

* During the course of oral argument, defense attorney Chisholm advised Judge Motley that Ford was presently serving a recently imposed eight-year sentence in Massachusetts and that there was "no way he could be released for five or six years any-way" (October 16, 1974 Transcript, p. 1).

moved to dismiss the indictment on the ground that Ford was being denied his right to a speedy trial (App. D). Also on November 4, 1974, Judge Motley denied the defense motion, granted the Government's application and set a new trial date of February 18, 1975.

When, on February 18, 1975, Judge Motley was engaged in a lengthy stock fraud trial, a new trial date of June 11, 1975 was set. While reiterating its speedy trial objection to the continuance, the defense at no time requested reassignment of the case to another District Judge (February 18, 1975 Transcript, pp. 1-4).

In the following month, however, the District Court announced a "crash" two-month program for the trial of civil cases to commence June 1, 1975. In view of both the "crash program" announcement and the large number of civilian witnesses scheduled to testify in the oft-ad-journed trial, Government counsel wrote to Judge Motley on March 28, 1975 (with a copy to defense counsel) requesting information as to the status of the matter on the Judge's trial calendar (G. App., pp. 3a-4a). A new firm September 2, 1975 trial date was thereupon set, a fact communicated to defense counsel in April of 1975. (G. App., p. 4a).

On August 8, 1975 the Government obtained a writ of habeas corpus *ad prosequendum* to secure Ford's appearance at the trial of Indictment S. 74 Cr. 336 (App. I).

At the commencement of the trial on September 2, 1975, Ford moved again to dismiss the indictment on speedy trial grounds (App. E; Tr. 2-3). The motion was denied by Judge Motley the following day (Tr. 186).

On September 9, 1975, following a six-day trial in which 36 witnesses testified for the Government and the

stipulated testimony of 12 others was read to the jury, Ford was convicted on all counts. On October 14, 1975, Ford was sentenced to concurrent five-year terms of imprisonment on each count. In imposing the sentence and recommending that it be served concurrently with the Massachusetts sentence, Judge Motley noted that Ford had availed himself within the preceding year of the opportunity to earn a High School equivalency diploma while in prison in Massachusetts (Transcript of October 14, 1975 Sentencing, pp. 5, 10, 15).

B. Trial Evidence:

The Government's Case

1. The Middletown Robbery and Investigation

On Wednesday, October 20, 1971, at approximately 11:15 a.m., three armed masked men entered the FDIC-insured Silver Lake Branch of the Orange County Trust Company (the "bank"), located at the corner of Route 211 and Fitzgerald Drive, across the street from Lloyd's Department Store in Middletown, New York (Tr. 41-46, 55, 58, 92-98, 119, 134-1736, 550; GXs 1, 5K, 5JJ). Bank employees had previously packaged \$190,000 in currency in two federal reserve bags for pick-up by armed Brink's guards for delivery to the Federal Reserve in New York City. Such pick-ups of excess monies by Brink's routinely occurred on Wednesdays at mid-day (Tr. 49-51, 73-74; GX 3).

The robbers, apparently aware of the Wednesday Brink's pick-up procedure, demanded the bags. Within moments, they left the bank with the two bags containing

\$190,000.00 and approximately \$14,000 in cash removed from one cash register * (Tr. 45-46, 52, 74-75). There were no surveillance cameras in the bank and none of the masked robbers could be identified by bank customers or employees ** (Tr. 47).

The robbers fled from the bank in a 1972 beige Plymouth (the "beige Plymouth") which had been stolen in the early morning hours of October 19, 1971 (the previous day) from Stanley Plymouth and Chrysler Dealer in Warwick, New York (Tr. 113-114, 143-146, 158-159, 167-168, 348-354; GXs 42A, 72-1, D, E, F, G) approximately 14 miles from Middletown (Tr. 613).

Approximately a half-mile from the bank, along Fitzgerald Road, the beige Plymouth passed Ms. Angela Whooley, a registered nurse who was walking home toward her apartment (Tr. 188-190, 196, 602-603, 606-607; GXs 5KK, 13C). She observed three men in the car (two in the front seat), getting a good look at only the driver and rear seat passenger (Tr. 191-103), Miss Whooley identified Ford at the trial as the driver of the car (Tr. 195). Two weeks after the robbery, on November 5, 1971, she had picked his photograph (GX 9-3) from a photospread as the driver (Tr. 221-231, 259-262; GX 10).***

* None of the money was ever recovered (Tr. 52).

** One of the robbers carried a shotgun. He was described as older and shorter than the others, approximately 5' 8" (Tr. 64-65, 83-84, 94, 97, 134, 140). The other two carried handguns and were both approximately six feet tall (Tr. 66, 84-85, 89, 92, 94-96, 107), the height of defendants Ford (Tr. 661-664; GXs 39, 40B, 105, 169) and Flynn (Tr. 689; CX 29 A). It was one of these taller men who demanded "the bags" (Tr. 45, 74-75, 94-95).

*** The day after the robbery Whooley had described the driver as having dark hair, a thin face and long nose (Tr. 194-195, 202-203). These were accurate descriptions of Ford (GXs 40A,

[Footnote continued on following page]

After crossing Route 211, the beige Plymouth proceeded to the parking lot of the Middletown High School * where the three robbers switched into a blue 1971 Plymouth (the "blue Plymouth") which had been stolen two days earlier from Hertz Rent-A-Car at Logan airport in Boston, Massachusetts ** (Tr. 165-166, 365; GXs 71-4, 71-11). The blue Plymouth, with three occupants, was observed leaving the parking lot by Thomas McCoy, a high school student (Tr. 272-278, 284-285).

McCoy initially identified Ford at the trial as the driver he had seen (Tr. 285-286).*** When recalled, how-

40B, 105, 106A). Whooley also described the driver as clean-shaved (Tr. 203), a description at odds with other evidence tending to show that Ford, who at that time was living under the alias of "Vincent Thomas" in Greenwood Lake, New York (see, *infra*, pp. 13-16), had a moustache (Tr. 450, 470, 495, 517, 560). The Government argued that Ford had cut off his moustache for the robbery (Tr. 759-761, 824-825).

* The beige Plymouth was recovered in the High School parking lot (GXs 5aa, 5dd, 5ii, 5ll, 72-1F, 72-1G). It contained a halloween mask (GX 72-3) and checkered overcoat (GX 72-2) which were identified by bank employees as having been worn by the man with the shotgun (Tr. 78, 98-99, 152-155). Shotgun bullets (GX 72-5a-d) were found in the pocket of the overcoat (Tr. 155). Human head-hairs found among vacuum sweepings taken from the beige Plymouth were mounted in slides by FBI laboratory technicians for future comparison purposes (Tr. 149-151, 684-688; GXs 72-7, 46). The car bore New Jersey license plate POP784 (GX 72-6), stolen from yet another automobile two days previously in Hackensack, New Jersey (Tr. 324-329). A bank employee who had observed the beige Plymouth speed away from the bank had furnished the police with New Jersey license number TPF784 (Tr. 46-47, 114-117, 137-139; GXs 6, 7).

** The blue Plymouth was the subject of the Dyer Act count of the indictment.

*** McCoy initially described the driver of the blue Plymouth (the occupant closest to McCoy) to interviewing agents as hav-
[Footnote continued on following page]

ever, as a Government witness at the trial, McCoy testified that he had been mistaken in his in-court identification, that Ford was not the driver, and that he (McCoy) could not say whether or not Ford had been one of the passengers (Tr. 666-669).*

The blue Plymouth was abandoned another half mile away at the parking lot of the Acme Shopping Center in Middletown where the three robbers ** switched to another vehicle and made their final getaway (Tr. 160-165, 335-344; GXs 5BB, 5ee 5ff, 71-1D, 71-1E).***

ing blond hair and blue eyes (Tr. 287, 295-298, 629, 668). This description matched that of Flynn (Tr. 705; GX29A), but not Ford, who had dark hair and brown eyes (GX 40A). Two months later, in January of 1972, McCoy mis-identified Ronald Christopher, a Middletown businessman, as the driver of the car he had seen (Tr. 290-291, 303-306, 624-625). Christopher, who had blond hair and blue eyes, bore a close resemblance to Flynn. Christopher appeared at the trial (Tr. 309, 317-323). 1971 photographs of Christopher were in evidence (GXs 16-1 to 16-5) as was a 1974 photograph of Flynn (GX 29A).

*On the evening before his recall as a witness, McCoy contacted the state police and told them that he had been mistaken in his in-court identification. The defense was so advised the following morning in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963) (Tr. 569-572) and the Government was given permission to recall McCoy to correct his erroneous identification (Tr. 666). In summation, the Government argued that the robbers had switched drivers when they had switched cars in the high school parking lot (Tr. 765-769, 822).

**Testimony of the manager of the Acme Super Market suggested that a fourth conspirator may have waited with the final getaway vehicle (Tr. 335-342).

*** The Hertz Rent-A-Car registration (GX 71-4) was found in the glove compartment of the blue Plymouth (Tr. 165). This car also bore a stolen license plate, NY4132AZ (Tr. 162-164; GXs 71-2, 71-1D). McCoy had written down license number "NY 413292" and furnished it to the police (Tr. 273, 280). The two stolen license plates found respectively on the beige Plymouth

[Footnote continued on following page]

2. The license plate connection

The blue Plymouth, when stolen from Logan Airport on October 18, 1971, two days before the robbery, bore Massachusetts license plates 439-65F (GXs 71-3A, 3B, 71-11). At approximately 10:00 p.m. on the evening of October 18, 1971 a man listing his name and address as "Robert P. Barry, 25 Lynn Shore Drive, Lynn Massachusetts" * registered for a party of two in Room 123 of the Holiday Inn in Middletown listing the make of his car as "Plymouth" and his license as "Mass. 439-65F". The motel registration and invoice (GXs 17, 18, 19) were found by the state police on November 2, 1971 (Tr. 365-373) and on the same day a latent fingerprint, which proved to be that of James P. Flynn, was lifted from room 123 (Tr. 417-432; GXs 26-3, 27, 28). There was no registration in Flynn's own name for the entire month of October, 1971 (Tr. 375, 617; GX 43).

3. The telephone calls connection

No telephone calls were made from Room 123 on the evening of October 18, 1971 (Tr. 618; GX 44D). Sometime between 9:00 p.m. and 10:00 p.m. on that evening, however, a call was made from a pay telephone in the lobby of the Holiday Inn to James P. Flynn's telephone number in Dorchester Massachusetts (Tr. 387-391, 397-398, 406-414; GXs 21A, 22, 23, 24, 25). **

and the blue Plymouth had been removed a few days previously from cars parked next to one another in a lot outside Bloomingdale's Department Store in Hackensack, New Jersey (Tr. 324-330; GX 71-12, stipulated testimony of Edward Revere). Also found in the trunk of the blue Plymouth were its original Massachusetts license plates (Tr. 164-165; GXs 71-3A, 3B).

* The name and address proved to be fictitious (Tr. 374; GX 20, stipulated testimony of postmaster of Lynn, Massachusetts).

** The Government theorized that this was a call from Ford to Flynn's residence to ascertain when Flynn had left Massachusetts for their scheduled rendezvous (Tr. 772-775).

Sometime between 11:00 p.m. and midnight on the same evening, after "Robert P. Barry's" arrival, another one minute telephone call was made from the pay telephone in the Holiday Inn lobby to the telephone number of Rod and Arlene Weaver in Greenwood Lake, New York, Ford's next door neighbors (Tr. 399-400, 475, 417-482; GX 21A).*

4. The Greenwood Lake Investigation

After working for a brief period in late 1970 at the Concord hotel in Kiamesha Lake, New York, under the aliases of Vincent and Natasha Thomas (Tr. 33-36; GXs 106A, 106B, 107A, 107B), Ford and his wife moved to Greenwood Lake in early 1971. Still maintaining the Thomas alias, they moved first into a bungalow owned by Harry Partridge (Tr. 442, 446-447, 470-471; GX 30). Through a next door neighbor at the Partridge bungalows, Richard Kettle, "Vincent Thomas" met Rod Weaver (Tr. 471, 497-498). In mid-September 1971, the Thomas's moved from the Partridge bungalows to an apartment above Sugar's Delicatessen, owned by Harry

* Later that night the beige Plymouth was stolen from Stanley Plymouth & Chrysler in Warwick (Tr. 349-353), on the route between Middletown and Greenwood Lake (Tr. 354-357, 499, 613-614; GX 18D) where Ford and his wife, Ellen, lived under the aliases of Vincent and Natasha Thomas (Tr. 439-518). The Weavers and the "Thomas's" were next door neighbors (Tr. 460, 472-473). Lacking any telephone of their own, the Thomas's would call one another on the Weavers phone (Tr. 473-475, 503, 516-517, 548). Arlene Pina (formerly Weaver (Tr. 468)) testified at trial that "Vincent Thomas" called sometime after 11:00 p.m. one evening but terminated the call quickly after being told (by Arlene Weaver) that Natasha had gone to bed (Tr. 477-482). Arlene Pina placed this call as having been received on either the Monday or the Thursday following the Weaver's return from their honeymoon, which was on Saturday, October 16, 1971 (Tr. 479-480). The following Monday was October 18th.

Saksenberg, next door to the cottage rented by Weaver (Tr. 447, 455-459, 472-473; GX 31). In various conversations with Patridge, Kettle and the Weavers, the Thomas's disclosed that they were originally from the Boston area (Tr. 500, 551), that they had lived in Las Vegas (Tr. 476)* and in California (Tr. 476, 500),** that Natasha worked as a waitress at Jorgensen's restaurant in New Jersey (Tr. 445, 463, 476-477, 500, 551),*** and that Vincent Thomas worked for a plumbing company that did a lot of work in Middletown (Tr. 476, 499, 544).****

As a plumber's helper for Charles J. Reid Plumbing Co., Vincent Thomas (Ford) spent a great deal of time at the Village on the Green construction site in Middletown, 2.1 miles from the bank (Tr. 545, 612-613). Throughout the summer of 1971, Thomas cashed his Wednesday payroll checks (GX 36E) at Lloyd's Department Store, across the street from the bank, where Thomas had check cashing privileges (Tr. 550, 573-574, 580-581; GXs 34A, 35C). Thomas's co-worker, John Petrie, testi-

* On February 24, 1970, Ford, then living under the alias of Joseph Michael Fitzgerald, married his wife Ellen (maiden name Dempsey) in Las Vegas. The marriage certificate was sent to their address at 1805 El Cerrito Place, Hollywood, California (Tr. 26-28; GXs 101-103).

** Ford and his wife Ellen, living as the Fitzgeralds, resided at 1805 El Cerrito Place, Hollywood, California in late 1969 and early 1970. Their California drivers licenses contained their photographs (Tr. 28-30, 464, 671; GXs 104, 105, 112)

*** Jorgensen's business records (GX 37A) reflected that Natasha Thomas's last day of work was Friday, October 22, 1971, two days after the robbery. She never bothered to pick up her wages for that day (Tr. 591-592).

**** The business records of Charles J. Reid Plumbing Co. (GXs 36a, B, C, D1, D2, E) reflected that Vincent Thomas worked for them as a plumber's helper from March, 1971 until October 22, 1971, his last day of work (Tr. 536, 557; GXs 36C, 36D2, 36E).

fied that Thomas frequently ate lunch at Lloyd's (Tr. 550) and that he, Petrie, frequently dropped Thomas off on the way back from Middletown at the Pioneer Restaurant in Warwick, New York, where Natasha would pick Vincent Thomas up (Tr. 546-548). The Pioneer Restaurant is located directly next door to the Stanley Chrysler and Plymouth Dealer from which the beige Plymouth was stolen (Tr. 357-359, 614-615; GXs 42A-E).

5. The Western Union Money Order Connection

On October 12, 1971, eight days before the robbery, a fifty dollar Western Union money order was sent by James P. Flynn in Boston, Massachusetts, to Ellen Fitzgerald (the former alias of Ford's wife) * in care of the Western Union office in Suffern, New York (Tr. 39-41, 717-719; GXs 110, 111). Suffern is twenty-five minutes from Greenwood Lake by car (Tr. 449).

6. The Thomas's final week in Greenwood Lake

The employment records of Vincent Thomas reflected that he worked (in Middletown) only four hours instead of his regular eight-hour shift on Tuesday, October 19, 1971, the day before the robbery (Tr. 532-534, 554; GX 36D1). He did not work at all on Wednesday, October 20th, the day of the robbery (Tr. 533-534, 554-556; GX 36D1). His final two days of work (both at job sites other than Middletown) were on October 21st and 22nd (Tr. 535-536, 556-557; GX 36D2).

Having lived in the apartment above Sugar's Delicatessen for only six weeks, the Thomas's abruptly left the Greenwood Lake area a few days after the bank robbery,**

* Ford and his wife were married in Las Vegas and lived in California under the names of Joseph and Ellen Fitzgerald (GXs 101-105, 112; Tr. 26-30). See, *supra*, p. 14.

** Vincent Thomas (Ford) left town on Sunday, October 24th (Tr. 481-483, 504-510). His wife left on the following Tuesday, October 26th (Tr. 481-482, 511-512).

leaving a great deal of clothing and furniture behind (Tr. 459, 463, 481-482, 511). During the week preceding Vincent Thomas's final departure from Greenwood Lake (that is, the week of the Middletown bank robbery), he had briefly left town, later explaining to Richard Kettle that he had been to Boston to look for a job (Tr. 507-508).

7. Subsequent Events

Following their departure from Greenwood Lake, the Thomas's occasionally called the Weavers and Richard Kettle (Tr. 483-494, 513-515). The Thomas's, however, never left a forwarding address with their Greenwood Lake neighbors* and never left a telephone number where they could be reached (Tr. 482, 484, 492, 513-516, 636).**

On October 11, 1973, Ford was arrested by FBI agents in Chicago as he attempted to escape by climbing down a rope ladder from his fifth floor apartment where he and his wife had been living since August, 1972 under the aliases of John and Ellen August (Tr. 657-663, 670-673; 677; GXs 39, 48).***

* The only forwarding address left at the Post Office was to "General Delivery, Newport, Rhode Island" (GXs 38-3, 38-4; Tr. 637-639, 646).

** During one of these phone calls, on December 6, 1971, Vincent Thomas learned that Rod Weaver had been interviewed that day by the FBI concerning the call made to his telephone number on the night of October 18, 1971 from the Holiday Inn in Middletown (Tr. 486-490, 494; G X41).

*** During cross-examination of the arresting FBI agents, the defense elicited the fact that there was also outstanding against Ford, in addition to the warrant in this case, a warrant from Massachusetts for Unlawful Flight to Avoid Confinement, Escape, Assault with Intent to Commit Murder (Tr. 664, 678, 681-682). The defense argued in summation that the Massachusetts warrant explained Ford's use of aliases and his attempt to escape

[Footnote continued on following page]

In April of 1974, having been ordered upon penalty of contempt by Judge Bauman of the District Court to provide hair samples for comparative purposes,* Ford refused to comply with the order and failed to furnish the hair samples (Tr. 702-710).

C. Trial Evidence:

The Defense Case

The defense presented no evidence.

ARGUMENT

POINT I

Ford's return to Massachusetts custody at his own request prior to trial did not violate the Interstate Agreement on Detainers.

Ford contends that his conviction should be overturned and the indictment against him dismissed with prejudice under Article IV(e) of the Interstate Agreement on Detainers, 18 U.S.C. Appendix (1970) ("IAD"), because he was returned from the Southern District of New York to Massachusetts on June 14, 1974, without first having been tried. Ford's efforts to apply Article IV(e) at this

from the FBI (Tr. 789-790). The Government responded that it did not explain the timing of Ford's move from Greenwood Lake, nor the link between Ford and Flynn established by Flynn's Western Union money order to Ford's wife on October 12, 1971, and the two phone calls from the Holiday Inn on October 18, 1971 (Tr. 828-833).

* Human head hairs had been found in the pocket of the overcoat and in vacuum sweepings taken from the beige Plymouth (Tr. 684-688).

late date ignore the fact that his return to Massachusetts custody came at his own request and the request of his attorney. In addition, the claim is made woefully late and would, if it prevails on the facts of this case, amount to a gross perversion of justice. As a result of Ford's return to Massachusetts custody, requested by the defense and never objected to in the District Court pre-trial or post-trial, Ford obtained the benefits of the educational program offered within the Massachusetts prison system * and was better able to confer with his Boston defense attorney and prepare his defense. In addition, Ford's contentions under the IAD incorrectly and impermissibly construe the statute.

A. Ford's contention under the Interstate Agreement on Detainers should be denied as untimely and, in any event, have been waived.

Ford was returned to Massachusetts custody on June 14, 1974, shortly after the first adjournment of his trial was granted by Judge Bauman (App. H). In the 14½ months preceding Ford's return to New York for trial no issue was raised by the defense under the IAD.** The failure to make such a motion was hardly surprising in view of the fact that Ford's return to Massachusetts was made at his own request (see pp. 3-4, *supra*) and the request of his attorney (G. App., p. 2a).

* Ford's availing himself of the educational opportunities offered in prison was a significant factor in the District Court's ultimate determination to impose concurrent sentences and recommend concurrency with the Massachusetts sentence (Transcript of October 14, 1975 Sentencing, pp. 5, 10, 15).

** During this same period, however, the defense did make motions for additional discovery (October 16, 1974 Transcript, pp. 14-15) and to dismiss the indictment on speedy trial grounds (App. D, E). The latter motions relied on the Sixth Amendment and the local court rules of the Southern District and made no reference to the IAD.

Ford offers no explanation whatsoever for his failure to raise his IAD claim prior to trial or, indeed, at any time, in the District Court. Rather, he contends that because Article IV(e) of the IAD does not itself by its terms require a defense motion prior to the court's dismissal order, no such motion in the District Court was necessary (Appellant's Brief, p. 16, fn. 15). In arguing that the IAD issue may be raised for the first time on appeal, appellant totally disregards Rule 12 of the Federal Rules of Criminal Procedure. Under Fed. R. Crim. P. 12(f), the failure to raise a defense or objection which must be made prior to trial, within time limits established by the court, constitutes a waiver of the defense or objection. Under Rule 12(b) "any defense, objection, or request which is capable of determination without the trial of the general issue *may* be raised before trial by motion," and all defenses and objections based on defects "in the institution of the prosecution" or "in the indictment or information" (other than subject-matter jurisdiction and failure to state an offense) *must* be raised prior to trial. Ford's IAD contention, while not directly covered by any provision of Rule 12, is, in essence, an attack upon a defect in the institution of the prosecution and should be deemed to have been waived under Fed. R. Crim. P. 12(f). There was absolutely no jurisdictional defect based on the IAD of such nature as to require this Court to notice it for the first time on appeal. In *United States v. Brown*, 76 Cr. 244 (S.D.N.Y., July 15, 1976),* confronted with essentially the same question in the context of a pretrial IAD motion made 19 days before trial and some three months after the defendant's return to state custody, Judge Metzner held that under Fed. R. Crim. P. 12(f), the defendant had waived any right to move to dismiss the Indictment on the basis of a claimed

* A copy of the *Brown* decision is included in the Government's Appendix for the convenience of the Court (G. App., 69).

violation of the IAD. *Brown's* implicit holding that IAD claims are non-jurisdictional and, hence, waived if not timely raised,* is eminently sound. The spectre of defendants successfully raising IAD claims for the first time after conviction, would do little to enhance public respect for the rule of law. The instant case provides a perfect example of the monumental waste of judicial and prosecutorial manpower and money which would be sanctioned by permitting so late an invocation of IAD claims. In addition, some 36 witnesses, mostly civilians, have appeared and been identified at trial at a time when a co-defendant with a history of violence remains in a fugitive status.

Where, as here, defendant's IAD claim is not raised until after trial, and the IAD claim itself arises out of a return to state custody requested by the defense, such claim must simply be denied as untimely under Rule 12(f) or barred under general equitable principles of estoppel.

* A survey of recent Circuit cases has revealed only two instances where the Courts have entertained and supported a post-conviction attack on jurisdictional grounds. In *United States v. Doyle*, 348 F.2d 715, 718 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965), the Court held that failure of an indictment to charge an offense may be treated as jurisdictional. No such failure is alleged here, not could it be. In *United States v. Macklin*, 523 F.2d 193, 196 (2d Cir. 1975), the Court held that an indictment returned within an improperly extended term of a grand jury was jurisdictionally defective. No such allegation is made here, nor could it be.

A challenge based on the statute of limitations is nonjurisdictional, *United States v. Parrino*, 212 F.2d 919, 922 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954); so is a speedy trial challenge. *Becker v. Nebraska*, 435 F.2d 157 (8th Cir. 1970), *cert. denied*, 402 U.S. 981 (1971); so, too, is a charge based on pre-indictment delay, *United States v. Eucker*, 532 F.2d 249, 255 (2d Cir. 1976); *United States ex rel. Pizarro v. Fay*, 353 F.2d 727, 727 (2d Cir. 1965).

B. The Interstate Agreement on Detainers does not apply to this case.

Even if Ford is permitted to complain for the first time on appeal about the pre-trial return to Massachusetts custody that he himself requested, no dismissal under Article IV(e) may result because the IAD was simply not applicable.*

Assuming, *arguendo*, Congressional intent to include the federal government as a "receiving" as well as a "sending" state within the meaning of the IAD (a position with which the Government disagrees),** the IAD by its terms*** merely "entitles" the receiving state, upon presentation of "a written request" for temporary custody to have a prisoner of another "party state" made available "in accordance" with provisions of the IAD.

* The Government is aware of a contrary interpretation of the IAD reached by Judge Bartels in *United States v. Mauro*, 414 F. Supp. 358 (E.D.N.Y. 1976), *appeal pending*, 2d Cir. Dkt. Nos. 76-1251, 76-1252. In *Mauro*, of course, the IAD issue was raised *promptly* and *pretrial*. In any event, the Government respectfully submits that *Mauro* was wrongly decided. Another District Court Judge has reached the same conclusion. See *United States v. Lee*, 76 Cr. 552 (S.D.N.Y., August 16, 1976, J. Goettel), a copy of which is included in the Government's Appendix for the Court's convenience (G. App., 7a-8a).

** See, *infra*, pp. 25-27.

*** Section IV(a) of the IAD provides in pertinent part as follows:

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated . . ."

Here there was absolutely no attempt to obtain Ford's presence in the Southern District of New York under the provisions of the IAD. Contrary to being "a written request" the writ of habeas corpus *ad prosequendum* under which Ford's presence was obtained was by its very terms a command or order.* There is not the slightest hint that either the Assistant United States Attorney who sought the writ or the District Court Judge who approved it assumed that they were proceeding under any authority other than the traditional Writ of Habeas Corpus *Ad Prosequendum* pursuant to 28 U.S.C. § 2241(c)(5). It stretches common sense too far to suppose that either the Assistant United States Attorney or the District Court Judge was aware that Massachusetts was a "party state" to the AID or that they even considered the question of whether or not Massachusetts was a "party state" ** at all relevant. The Writ itself commanded Ford's presence on April 1, 1974, to "plead" to the Indictment (App. H) and the affidavit in support of the writ stated that it was necessary that the defendant appear on that date simply to "plead to Indictment 74 Cr. 279". (See Affidavit of Assistant United States Attorney Jed S. Rakoff dated March 25, 1974).***

The record also reveals that the Massachusetts authorities treated the Government's demand to produce the

* The Writ, addressed to the Warden of the Walpole Massachusetts Correctional Institute and the Marshall for the Southern District of New York begins: "YOU ARE HEREBY COMMANDED . . ." (App. H).

** Only 39 of the 50 states are "party states". *United States v. Mauro*, *supra*, 414 F. Supp. at 359. Massachusetts is one such "party state". M.G.L.A. c. 276 app. §§1.1-1.8.

*** The later affidavit in support of the writ commanding Ford's attendance on September 2, 1975, on the other hand, stated that it was necessary that he "stand trial at that time" (App. I), and the latter writ commanded that Ford's presence be obtained "to stand trial" at that time.

defendant as an order pursuant to a Writ of Habeas Corpus *Ad Prosequendum*, and not as a request filed under the terms of the IAD. Article IV (a) of the IAD, which outlines the procedures for securing the presence of a defendant incarcerated out of the jurisdiction, also requires that:

"there shall be a period of thirty days after receipt by the appropriate authorities before the request [to produce a defendant] be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner." 18 U.S.C. App., Art. IV (a) (1970).

The Writ of Habeas Corpus *Ad Prosequendum*, in contrast, does not require a period of delay prior to its execution, and its enabling legislation does not provide a means by which a defendant may challenge its order. 28 U.S.C. § 2241 (1970). The record in this case indicates that the Government's writ was issued March 25, 1974, returnable on April 1st. The defendant was produced in the Southern District of New York on the return date, well before the completion of the 30-day delay period mandated by the IAD. Thus, it is clear that all parties were proceeding pursuant to a Writ, not the IAD. Only the IAD requires that a case be disposed of prior to the prisoner's return. There are no such restrictions on a Writ. 28 U.S.C. § 2241 (1970).

Ford has cited cases that appear to stand for the proposition that with the passage of the IAD, Congress in one swoop repealed the power of federal judges to issue Writs of Habeas Corpus *Ad Prosequendum* pursuant to 28 U.S.C. § 2241(c)(5) and rendered the IAD the exclusive means of obtaining custody of prisoners in other jurisdictions. See *United States ex rel Esola v. Groomes*,

520 F.2d 830 (3d Cir. 1975); *United States v. Mauro*, *supra*. In *Esola*, a divided court said that the IAD was the exclusive means for a sovereign state to obtain custody of a federal prisoner, deeming a New Jersey writ addressed to the Danbury Correctionary Institution to be a "request" under the IAD. In *Mauro*, in which a Government appeal is pending, Judge Bartels reached even farther, deeming a Writ of Habeas Corpus *Ad Prosequendum* issued from the Eastern District of New York District Court to a state institution to have been a "request" under the Act. The Government respectfully submits that *Mauro* is plainly wrong.*

The principles of *Mauro*, if adopted, would have the effect of eradicating a procedure that is rooted in the earliest traditions of the English Common Law, *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), and that has played an important role in the enforcement of the power of the federal courts in this country. *See, e.g., Carbo v. United States*, 364 U.S. 611 (1961). It is unthinkable that Congress—in the face of the Act's undistinguished and sparse legislative history, which does not mention the point—could have *sub silentio* repealed a judicial power which has been recognized in America since at least 1807. *Id.* Moreover, in reaching for its awkward result, *Mauro* ignores a fundamental principle of statutory construction, that where Congress has expressly legislated with respect to a given matter—as it has in the enactments of 28 U.S.C. §§ 1651 and 2241(c) (5)—such express legislation is not repealed by mere implication or inference in subsequent legislation. *Rosenkrans v. United States*, 165 U.S. 257 (1897).

* *Esola*, involving as it did a state writ honored by Danbury merely as a matter of comity, may be correct in that there is no all powerful writ available to the sovereign states. But *Mauro's* extension of *Esola* to Federal prosecutions is wholly unjustified in the Federal jurisdiction where there is such a writ.

In addition, *Mauro's* basic assumption that the IAD applies to the federal government as a "receiving state" as well as a "sending state" is also highly suspect. The legislative history and purpose of the IAD strongly suggest that it was never intended to be applied to the federal government as a "receiving state". If the IAD does not apply to the federal government as a "receiving state", then Ford's IAD claim must be rejected even if the March 25, 1974 writ—contrary to the apparent belief of all the parties at the time—is deemed to have been simply an IAD "request".

It bears emphasis that prior to the Act, federal courts were able to issue writs of habeas corpus for production of prisoners from state custody. *Carbo v. United States*, 364 U.S. 611 (1961). State courts, however, could not issue a writ to obtain a prisoner from federal custody. *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858). Thus, full extradition procedures were preconditions to removal of a prisoner to a state jurisdiction from either federal custody* or the custody of another state. Against this background, it is clear that a major purpose of the Act was to provide a legal framework for the federal government to honor state requests for temporary custody of prisoners—a procedure which was necessary to assure mandatory speedy trials in the state. See, *Smith v. Hooey*, 393 U.S. 374, 377 (1969); Interstate Agreement on Detainers, Article I, Section 2; S. Rep. No. 1356, 91st Cong. 2d Sess. (1970), reprinted in 3 U.S. Code Cong. and Admin. News 4864 (1970).

The legislative history underlying the Act demonstrates that the concern for allowing the states an adequate procedure was a foremost consideration. Thus, the Senate Report, *supra*, acknowledges Congress' awareness and approval of the enactment of a procedure to

* Unless the Attorney General consented to an executive request pursuant to 18 U.S.C. § 4085.

give state governments temporary custody of federal prisoners in order to clear *state* detainees. Indeed, the Senate Report is replete with references to the background problems responsible for the legislation which cast the federal government in the position of a "sending state" alone, and not a "receiving state". See, e.g., Senate Report, *supra*, at 4866, 4868; *Smith v. Hooey*, *supra*. And, in considering the "impact and cost" of the legislation, the Senate considered solely the effect of the Act on *State detainees* lodged against federal prisoners where the United States would become the sending state. Senate Report, *supra*, at 4867. As this Court well knows, the present practice of long standing in the Southern District of New York has been to return state prisoners to the state place of incarceration wherever feasible after every step of the federal proceedings against them, *i.e.*, arraignment, pretrial hearings. If the IAD is to be interpreted as including the federal government as a "receiving" state, each and every one of those state prisoners will have to be kept and maintained at the Metropolitan Correctional Center from arraignment through trial, a process which could stretch out for months, causing an astronomical increase in the expenses to the federal government, not to mention the serious overcrowding at the MCC which would occur. Surely, the Director of the Bureau of Prisons was not contemplating such an interpretation when he informed Congress that "the cost of the legislation to the Federal Government would be comparatively small". *Id.*

Simply put, the legislative history does not show any intention on Congress' part to apply the IAD to the federal government as a "receiving" state. Moreover, it cannot be imagined that Congress would have intended to apply the IAD to the federal government as a receiving state and at the same time revoke the Writ of *Habeas Corpus Ad Prosequendum*, without discussion. *Mauro's* conclusion to the contrary—relying in part on the lan-

guage of the IAD—does not satisfactorily explain such a Congressional oversight.

Finally, the Congressional intent behind the Act was made crystal clear in the pending section 3201(a) of the Criminal Justice Reform Act of 1975 (S-1), which was introduced in the Senate on January 15, 1976. That section makes explicit that the federal government joined the Interstate Agreement solely as a "sending state". The Senate Committee on the Judiciary explained that the provision in S-1 was designed to clarify an always intended limitation of the Act:

"Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal Court pursuant to 28 U.S.C. § 2241(c)(5), the Federal writ of habeas corpus *ad prosequendum*. The Committee does not intend, *nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ.*" (Emphasis added.)

Such an expression of intent by twelve of the fifteen members of the Committee originally responsible for the drafting of the 1970 Agreement, is a clear guide to the IAD's true meaning and intended effect.

The Government submits that Congress' intention to limit federal participation in the Act to that of a sending state is thus sufficiently clear. *Mauro*, which stands as the first and only decision to apply the Act to the federal government as a receiving state, reaches that result by an overly technical and literal interpretation of the Act, which does not withstand analysis of the congressional purpose and intended effect. Moreover, *Mauro* achieves its result by remarkable dictum unnecessarily repealing by implication the habeas corpus writ. We submit that the *Mauro* opinion is fatally flawed in these respects and

accordingly offers little support for appellant's contentions here.*

POINT II

The delay in Ford's trial violated neither the Southern District Rules nor the Speedy Trial Provision of the Sixth Amendment.

Ford also contends on appeal that the delay in his trial violated both the then effective Southern District Plan for Achieving Prompt Disposition of Criminal Cases (hereafter "the Southern District Rules") and his Sixth Amendment Speedy Trial rights. Ford's contentions were consistently rejected in the District Court. The Government submits that the determinations of Judges Bauman and Motley were clearly correct and should be affirmed.

In *Barker v. Wingo*, 407 U.S. 513 (1972), the Supreme Court delineated the criteria to be balanced in determining whether a delay in trial so impinges on a

* It should also be noted that Ford was tried, convicted and sentenced on Indictment S 74 Cr. 336. The March 25, 1974 Writ was issued on Indictment 74 Cr. 279 which indictment was dismissed for failure to prosecute on October 14, 1975, when Ford was sentenced (see Transcript of October 14, 1975, Sentencing, pp. 17-18). The original indictment and the initial November, 1971, complaint charged Ford solely with bank robbery. The superseding indictment also charged him with a Dyer Act violation, use of a gun in the commission of a felony and conspiracy. Ford's claim at best, therefore, is that Indictment 74 Cr. 279 should have been dismissed on IAD grounds and that the bank robbery count of the superseding indictment should have been dismissed on the grounds of double jeopardy. Such a double jeopardy claim, having never been raised prior to trial, has clearly been waived. *United States v. Conley*, 503 F.2d 520 (8th Cir. 1974). In view of the concurrency of sentences on all four counts of the superseding indictment, any error was harmless in any event.

defendant's rights as to foreclose further prosecution. Among these are (1) the length of delay, (2) the reason for the delay, (3) prejudice caused the defendant by the delay, and (4) the defendant's assertion of his right to a prompt trial. *Id.* at 530-532.

By constitutional standards, the length of the delay here—23 months from Ford's October, 1973 arrest to trial, 17 months from indictment to trial—was not extraordinary. *United States ex rel. Spina v. Mc Quillan*, 525 F.2d 813, 818 (2d Cir. 1975); see, also, *United States v. Lasker*, 481 F.2d 229, 237 (2d Cir. 1973), *cert. denied*, 415 U.S. 975 (1974); *United States v. Infanti*, 474 F.2d 522, 527 (2d Cir. 1973), and the cases cited in *United States v. Roberts*, 515 F.2d 642, 645 and 649 n. 3 (2d Cir. 1975). Ford was indicted and produced in the Southern District of New York within two months of his conviction and sentencing in Massachusetts. The delays from May 28, 1974 to February 18, 1975, requested by the Government in the hopes of apprehending co-defendant Flynn * were eminently reasonable. A joint trial of the two defendants would have resulted in a substantial saving of judicial and prosecutorial time, effort and expense. In addition, through such an adjournment, it was hoped that the large number of civilian witnesses would not have to be exposed prior to the arrest of a fugitive co-defendant with a long history of violent conduct.

Ford was not prejudiced in any significant manner by any portion of the pre-trial delay. *Barker v. Wingo*, 407 U.S. 514, 532 (1972); *United States v. Nathan*, 476 F.2d

* The trial date was initially adjourned by Judge Bauman from May 28, 1974 to August 21, 1974 on the Government's motion. A later trial date of November 18, 1974 was set when the case was reassigned to Judge Motley following Judge Bauman's resignation. A second Government-requested adjournment to February 18, 1975, was granted by Judge Motley.

456, 461 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973). He was serving his Massachusetts sentence and, as his defense attorney made clear in oral argument before Judge Motley, there was "no way he could be released for five or six years anyway" (October 16, 1974 Transcript, p. 11). Ford's defense was in no way impaired. No defense witnesses were called. No claim was made that defense evidence had become unavailable.* There is not even a suggestion that the delay was prompted by a Government desire to obtain some form of tactical advantage over the defendant at trial.

Finally, while Ford did oppose the two ninety-day adjournments sought by the Government, at no time did Ford object to the reassignment of the case to Judge Motley or request that the case be reassigned again to another District Court Judge with a less crowded trial calendar.** Cf. *United States v. States v. Drummond*, 511 F.2d 1049, 1054 (2d Cir. 1975), *cert. denied*, — U.S. — (1976).

Ford has thus failed to meet any of the criteria of the *Barker v. Wingo* test and his Sixth Amendment Speedy Trial claim must therefore be rejected.

* The dimming of memories of Government witnesses worked, if at all, to Ford's advantage. In any event, the major portion of the delay in trial resulted from Ford's two-year *fugitivity* following the bank robbery.

** In *Barker v. Wingo*, *supra*, the Supreme Court noted that the flexible criteria which it adopted in assessing sixth amendment speedy trial claims "would also allow a court to weigh the frequency and *force* of the objections as opposed to attaching significant weight to a purely *pro forma* objection." *Id.* at 529. While Ford preserved his record below, at no time did he suggest any way in which his defense was prejudiced by the delay. Having failed below to even assert any manner in which the defense might conceivably be impaired by the delay, Ford's demands for a speedy trial must be viewed as largely "*pro forma*".

Similarly without merit is Ford's claim under the Southern District Rules.* In the first place, Ford would give no effect whatsoever to the Notice of Readiness filed by the Government in connection with the original indictment, 74 Cr. 279, on April 1, 1974. The Government consistently indicated its ability to proceed to trial against Ford and obviously would have proceeded had the District Court denied its application for an adjournment for the sole purpose of seeking a fugitive co-defendant. Ford cites no authority for the proposition that the granting of a motion to adjourn vitiates a previously filed Notice of Readiness where the adjournment is sought not because of lack of readiness to go to trial against the defendant to whom the notice was addressed but, rather, in order to apprehend a fugitive co-defendant. Cf. *United States v. Pollak*, 474 F.2d 828 (2d Cir. 1973).

Furthermore, in computing the period of non-excludable time under Rule 5, Ford includes the two ninety-day adjourned periods granted by Judges Bauman and Motley to afford the Government an opportunity to apprehend fugitive co-defendant Flynn. (Appellant's Brief, pp. 28-29). Under any fair reading of the Southern District Rules, both of these periods should be excluded from the computation.

Rule 5(e) of the Southern District Rules excludes:

"A reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and there is good cause for not granting a severance."

Here, of course, no time had run as to Flynn who became a fugitive almost immediately upon the filing of the in-

* Ford claims that there was a period of 10 months and 24 days of non-excludable time under Rule 5 of the Southern District Plan (Appellant's Brief, pp. 28-29).

dictment. Southern District Rule 5(d). Not only was there ample cause to deny a severance, but, in fact, no severance motion was ever made.* Having failed to make such a motion, Ford is hardly in a position to argue that a severance should have been granted. *United States v. Cangiano*, 491 F.2d 906, 909 (2d Cir.), *cert. denied*, 419 U.S. 904 (1974); cf. *United States v. Lasker*, 481 F.2d 229, 234 (2d Cir. 1973), *cert. denied*, 415 U.S. 954 (1974).**

* The burden was clearly on the defense to move for a severance under Rule 5(e). *United States v. Lasker*, 481 F.2d 229, 233-234 (2d Cir. 1973), *cert. denied*, 415 U.S. 954 (1974); *United States v. Rollins*, 475 F.2d 1108, 1110 (2d Cir. 1973).

** The applicability of the procedures set out in *United States v. Lasker*, *supra*, to this case might at first seem to be limited by this Court's recent decision in *United States v. Didier*, — F.2d —, Dkt. No. 76-1331, slip op. 73 (2d Cir., October 13, 1976). *Didier* appears to indicate that the *Lasker* procedures—and in particular the placing of the burden on the defendant to move for a severance in the event of a fugitive defendant—may be limited to the superseded Second Circuit rules and is inapplicable to the Southern District Rules pending during this matter. Slip op. at 85 & n.9.

Initially, it should be noted that the Government will be seeking rehearing on the *Didier* opinion based on the fact that its essential holding—the limitation of *Lasker* to the Second Circuit rules—is diametrically inconsistent not only with *Lasker* but with the later decision in *United States v. Bowman*, 493 F.2d 595, 596 n.1 (2d Cir. 1974).

At any rate, *Didier* is inapplicable to this case. Among the numerous grounds for distinction are 1) that *Didier* involved Rule 6 of the Southern District Rules mandating actual commencement of the trial after a mistrial, rather than the "readiness" provision of Rule 4; 2) that the delay in *Didier* was sought by the Government "for tactical purposes," slip op. 87, rather than in the interest of judicial economy and to protect witnesses, as here; and 3) that the District Court in this case granted *specific* periods of adjournment, as required by *Didier*, rather than *sine die* adjournments.

In addition, the general provision of Rule 5(h) excluding any "period of delay occasioned by exceptional circumstances" would also appear to be applicable under the circumstances set forth in the Government's public and sealed affidavits. Excluded periods under Rule 5(h) have been held by this Court in analogous situations to include periods in which the chief government witness was himself under suspicion in an investigation which might be compromised if he testified and adjournments granted to protect the safety and usefulness of an informant. *United States v. Rollins*, 487 F.2d 409, 413 (2d Cir. 1973); *United States v. Cuomo*, 479 F.2d 688 (2d Cir. 1973), *cert. denied*, — U.S. — (1974). The exposure of civilian witnesses where a co-defendant with an extensive criminal history remains at large certainly falls within the rubric of "exceptional circumstances" particularly where, as here, Ford suffered no meaningful prejudice by the adjournments.

As noted by this Court in *Rollins*, the Rules "are designed to permit the district courts to exercise a sound discretion in cases where special circumstances require an extension of time." *United States v. Rollins*, *supra*, 487 F.2d at 413, n. 8. That discretion certainly was not abused by the Court below.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

DON D. BUCHWALD,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*

GOVERNMENT'S APPENDIX

JSR:bg

June 3, 1974

Ronald J. Chisholm, Esq.
Three Center Plaza
Boston, Massachusetts 02108

Re: United States v. Richard
Thomson Ford, et. al.,
74 Cr. 336 (AB)

Dear Mr. Chisholm:

At our meeting of May 14, 1974, at which time I made available to you extensive discovery in this case, I mentioned that there was one item to which you were entitled which I did not yet have in my possession: the results of the comparisons done between the handwriting and handprinting of defendant Ford (your client) and a certain Holiday Inn registration (already shown to you) obtained by the Government in its investigation of this case. I have now received the FBI report relating to this comparison, as well as to comparisons made with respect to exemplars from another person involved (as you know) in this investigation, James Michael Murphy. A copy of the report is here enclosed.

This, I believe, completes the pre-trial disclosure in this case, but I will, of course, review my files shortly prior to trial (presently calendared for August 21), and, if there is any discovery which I have overlooked or which is received after today, I will make it available to you reasonably before trial.

2a

I have conveyed to the United States Marshal here your request that defendant Ford be sent back to Walpole prison so that you can meet with him more conveniently in preparation for trial, and I have informed the Marshal that the Government consents to your request.

Yours truly,

PAUL J. CURRAN
United States Attorney

By:
JED S. RAKOFF
Assistant United States Attorney

DDB:ais
71-3397

March 28, 1975

Honorable Constance Baker Motley
United States District Judge
Southern District of New York
Federal Courthouse
Room 2001
Foley Square
New York, New York 10007

Re: United States v. Ford and Flynn;
S74 Cr. 279

Dear Judge Motley:

I am writing in connection with the above matter which is presently on Your Honor's calendar for trial of defendant Richard Ford on June 11, 1975. It has been estimated that the trial will last one to two weeks. It is a case involving an alleged \$200,000 robbery in 1971 of a bank in Middletown, New York. The co-defendant, Flynn, is in a fugitive status. Ford is presently incarcerated as a result of an unrelated Massachusetts conviction.

Opposing counsel and myself have entered into a number of stipulations and are considering others which I hope will reduce the number of witnesses and the length of the trial. Nonetheless, at present, the Government contemplates calling in excess of 30 witnesses, most of whom are not law enforcement agents and some of whom live at great distance from New York. Since the setting of the June 11th trial date, the District Court has indicated that the month of June will be largely devoted to the trial of civil cases.

4a

In view of the number of witnesses on call and their often expressed desire to be notified as far in advance as possible of any change in the trial date, so that they might plan their own personal work schedules and vacations. Accordingly, I would most appreciate being advised by the Court of the present status of this matter on Your Honor's calendar.

Respectfully yours,

PAUL J. CURRAN
United States Attorney

By:
DON D. BUCHWALD
Assistant United States Attorney
Telephone (212) 791-1921

cc: Ronald J. Chisholm, Esq.
Three Center Plaza
Boston, Massachusetts 02108

DB:js
71-3397

April 28, 1975

Ronald J. Chisholm, Esq.
Three Center Plaza
Boston, Massachusetts 02108

Re: United States v. Richard T. Ford;
S 74 Cr. 236 (CBM)

Dear Mr. Chisholm:

In connection with the trial of the above-mentioned matter, presently scheduled for September 2, 1975 I am enclosing herewith:

(a) the original and two copies of a proposed stipulation pertaining to the testimony of Joan

L. Swift, County Recorder of Clark County, Nevada, concerning, more particularly, the marriage of your client (under the name Joseph Michael Fitzgerald) to his wife, Ellen G. Dempsey, on February 4, 1970. In connection with this matter which we have previously discussed, I am also enclosing a copy of an FBI Report pertaining thereto;

(b) the original and two copies of an updated "Hertz" stipulation which you have indicated you will recommend to your client. Copies of the relevant FBI reports pertaining to this testimony have previously been furnished to you.

Please execute and return to me the original and one copy of each stipulation (retaining one copy for your files). Please advise as soon as possible if either stipulation is unsatisfactory.

Very truly yours,

PAUL J. CURRAN
United States Attorney

By:
DON D. BUCHWALD
Assistant United States Attorney
Telephone: (212) 791-1989

Enclosures

United States v. William Brown, et al.

76 Cr. 244

Defendant William Brown moves to dismiss the indictment for the failure of the government to comply with the Interstate Agreement on Detainers Act (the Act), 18 U.S.C. App.

Brown was named as one of the defendants in an indictment filed in this court on March 11, 1976. At the time, he was serving a sentence under a New York State conviction. A writ ad prosequendam was filed at Green Haven Prison on March 18, 1976, and defendant pled not guilty on March 22. He was returned to state custody on March 29, 1976.

On April 2, 1976, the court held a pretrial conference held on May 6, the time for discovery motions and a possible severance motion was extended to May 14. On May 6, a trial date of July 20, 1976, was agreed upon.

The instant motion was filed on July 1, 1976. Under Fed. R. Crim. P. Rule 12(f), the motion is not timely made.

Cause has not been shown to predicate relief from failure to make timely objection. The spirit of the Act is not violated here since the defendant will be tried at most a day after he should have been tried under the Act. Furthermore, his return to state custody after arraignment in this court was at his request and for his convenience.

Motion denied.

So ordered.

Dated: New York, N.Y.
July 15, 1976

CHARLES M. METZER..
U.S.D.J.

ENDORSEMENT

UNITED STATES OF AMERICA v. SAMMY LEE,

76 Cr. 552 (GLG)

GOETTEL, D.J.

Defendant moves, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, to dismiss the indictment with prejudice because of the alleged failure of the Government to comply with the Interstate Agreement on Detainers.

On July 17th the U.S. Attorney's office lodged a Writ of Habeas Corpus Ad Prosequendum with the New York State authorities at Rikers Island to obtain the presence of the defendant, Sammy Lee, for arraignment on this indictment. He was brought by the U.S. Marshals to this courthouse for arraignment. Through his counsel he argued for low bail contending that he was about to be released on a work-release program from state custody. (It has subsequently developed that the defendant's contentions in this regard were premature.)

The Writ which brought the defendant to this court was never satisfied. Nevertheless, the U.S. Marshal's office mistakenly returned him to Rikers Island. When the U.S. Attorney's office learned of this mistake a week later, they had him immediately returned to the Metropolitan Correctional Center.

The defendant argues that the foregoing facts mandate a dismissal of the charges pursuant to the Interstate Agreement on Detainers, citing Judge Bartels' recent decision in *United States v. Mauro* (E.D.N.Y. May 17, 1976). Briefly, Judge Bartels held that the Interstate Agreement is as applicable to the United States

as a "receiving state" as it is to the States of the Union, that the use of a Writ, rather than a Detainer, does not matter since the Government is charged with having invoked the agreement even though it proceeded by a different type of process and, finally, that, although dismissal of the indictment in such circumstances was not intended by Congress, since it falls within the express language of the agreement the result is mandated until such time as Congress corrects its error.

I most respectfully disagree with Judge Bartels' conclusion. However, even if his view is correct the facts of this case do not warrant its application. The Writ of Habeas Corpus in this case was not satisfied. The defendant was never legally returned to state custody. The error made was rapidly corrected, without any prejudice to the defendant.

If we dismiss an indictment because of an insignificant error of this nature, then there is most assuredly something wrong with our application of the law. The motion is denied.

SO ORDERED:

Dated: New York, N.Y.
August 16, 1976.

GERARD L. GOETTEL
U.S.D.J.

W. H. H. Lee
22/10/01

